8-9-2011

Kendall v. Orthman Respondent's Brief Dckt. 38397

IN THE SUPREME COURT OF THE STATE OF IDAHO

CHARLES KENDALL, Plaintiff/Appellant, vs. NANCY ORTHMAN, Defendant/Respondent,	)	SUPREME COURT DOCKET NO. 38397-2011 MINIDOKA COUNTY DOCKET NO. CV-2009-308

RESPONDENT'S BRIEF

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Minidoka, Honorable Jonathan P. Brody, District Judge, presiding.

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

NATURE OF CASE

Plaintiff sued Defendant for $50,000.00 of the proceeds she received upon sale of her property claiming a horse barn and corrals he had installed on her premises increased the value. Defendant denied Plaintiff's claim.

COURSE OF PROCEEDINGS

The case was tried before the Honorable Jonathan Brody, District Judge. The Court entered its Findings of Fact and Conclusions of Law in favor of Defendant and dismissed Plaintiff's case. Plaintiff filed a timely notice of appeal.

STATEMENT OF FACTS

The Plaintiff's recital of facts omitted significant evidence which supported the Court's decision.

Most significant was the testimony of Lloyd Smith, a real estate broker with 17 years of experience in selling real property in the Mini-Cassia area (Tr p. 290, L. 10). Smith had done a market analysis before he listed the property for sale. Lloyd testified that the horse barn and corrals added no value to Nancy's rural residence and

irrigated acreage (Tr p. 300, L. 13). Lloyd Smith was the only witness with real estate expertise who testified on the specific issue of whether the horse barn and corrals added value to the Defendant's property.

Plaintiff called J. Patrick Merrigan, a certified real estate appraiser (Tr p. 175, L. 20). The Plaintiff tried to adduce testimony from Pat Merrigan about the cost of construction of the building using regional data regarding the cost of construction. Merrigan had not examined the barn and corrals (Tr p. 175, L. 9-16). He was not asked whether the horse barn and corrals contributed to the value of the Defendant's property.

The Defendant did not ask the Plaintiff to build the horse barn on her property, and she did not acquiesce in the construction of the horse barn until the Plaintiff wore down her resistence by his repeated insistence (Tr p. 240, L. 20-24). There is no evidence in the record that the Defendant ever wavered from her insistence that the property was acquired by her as her separate property, and that she intended to retain it as her separate property (Tr p. 243, L. 3-23).

The Plaintiff was a self-employed farrier (Tr p. 330, L. 1-25). Due to financial problems he could not marry (Tr p. 23, L. 18-20) He had no financial records to support his claimed investment (Tr p. 145, L. 13-25). He did not file income tax returns (Tr p. 146, L. 1-7). He had a passion for chariot racing as a hobby (Tr p. 124, L. 4-7), and he dreamed of owning his own horse barn to support his activity.

When the Defendant finally caved into Plaintiff's requests that he be allowed to build a horse barn on her property (Tr p. 243, L. 3-23), he started assembling it from two used labor shacks he had acquired in the 1980s (Tr p. 132, L. 17-20), some used roofing material from the Cassia Hospital he purchased for $300.00 (Tr p. 134, L. 15-24), used corrugated metal he bought for $500.00 (Tr p. 134, L. 1.14), and free abandoned irrigation pipe he cut up for corral posts (Tr p. 136, L. 8.13). The labor shacks were just set on concrete blocks (Tr p. 135, L. 14-17). The quality of workmanship and materials was substandard (Tr p. 245, L. 1-24).

The horse barn was completed in 2002 (Tr p. 138, L. 13-

19). In 2006 the Defendant had grown tired of supporting the Plaintiff's racing habit. She asked him to pay the irrigation bill for the pasture. The Plaintiff threw an empty money clip at her, and she told him to get out of her home (Tr p. 254, L. 7-14).

Nancy let him use the horse barn and corrals until 2008 without payment of rent or utilities (Tr p. 255, L. 7-24). Defendant told Plaintiff he could take the horse barn (Tr p. 257, L. 6-12), but he failed to do so.

Plaintiff provided help to the Defendant in cleaning up the property when she originally purchased it, but he left it in a state of disrepair and in a trashy condition. He hauled in an outhouse (Tr p. 287, L. 17-24, Ex. V), and left scrap material and boxes of used horseshoes lying around. Defendant had to haul loads of junk to the dump to make the property presentable, so it could be sold (Tr p. 258, L. 2-16). The corral posts, which consisted of lengths of abandoned irrigation pipe, had open ends with no footings under them. Over time, they began to sink into the ground, so they would not support the fence rails and gates (Tr p. 334, L. 25 and Tr p. 335, L. 1-4).

The Plaintiff lived in Defendant's home rent free from 2000 to 2006, and he used Defendant's land and pasture rent free from 2002 until 2008 (Tr p. 142, L. 13-23).

Nancy was employed on a full-time basis from the time the relationship began (Tr p. 240, L. 1-10, Ex. FF).

The Trial Court found that the testimony of the Defendant was more credible than the testimony of the Plaintiff in the Court's Findings of Fact, Conclusions of Law and Order. Finding 42. (R p. 21).

ADDITIONAL ISSUES ON APPEAL

IS DEFENDANT ENTITLED TO AN AWARD OF ATTORNEY FEES ON APPEAL UNDER SECTION 12-121 OF THE IDAHO CODE AND RULE 54(e)(1) OF THE IDAHO RULES OF CIVIL PROCEDURE?

ATTORNEY FEES ON APPEAL

NANCY ORTHMAN SHOULD BE AWARDED ATTORNEY FEES ON APPEAL UNDER SECTION 12-121 OF THE IDAHO CODE AND RULE 54(e)(1) OF THE IDAHO RULES OF CIVIL PROCEDURE, BECAUSE THE PLAINTIFF'S APPEAL IS PURSUED FRIVOLOUSLY, UNREASONABLY AND WITHOUT FOUNDATION.

The award of attorney fees on appeal is proper under Section 12-121 of the Idaho Code and Rule 54(e)(1) of the

Idaho Rules of Civil Procedure when the appeal has been brought frivolously, unreasonably and without foundation Durrant v. Christensen, 17 Idaho 70, 785 P 2nd 634 (1990); Minich v. Gem State Developers, Inc., 99 Idaho 911, 591 P 2nd 1078 (1979).

This appeal has been pursued frivolously. The District Court's refusal to allow the alleged offer of settlement to have been entered into the record is upheld by well-settled law as shown below. The argument that Rule 408 should not apply to the alleged offer was disingenuous.

The District Court's conclusion that Orthman was not unjustly enriched was supported by substantial, competent evidence. The District Court's finding that if there had been a benefit to Nancy Orthman, it would not be unconscionable for her to retain the benefit was likewise supported by substantial, competent evidence.

In Excel Leasing Co. v. Christensen, 115 Idaho 708, 769 P 2nd 585 (Ct. App. 1989) the Idaho Court of Appeals held that where the Appellant failed on appeal to present any significant issue regarding a question of law, where no findings of fact made by the District Court were clearly or

arguably unsupported by substantial evidence, or where the Court was not asked to establish any new legal standards or modify any existing ones and where the focus of the case was the application of subtle law to the facts, the appeal was deemed to be unreasonable and without foundation.

Nancy Orthman is entitled to an award of attorney fees on appeal.

ARGUMENT

I

STANDARD OF REVIEW

When an action has been tried to a court sitting without a jury, appellate review is limited to ascertaining whether the evidence supports the trial court's findings of fact and whether these findings support the court's conclusions of law. Morris v. Frandsen, 101 Idaho 778, 780, 621, P 2nd 394, 396 (1980).

The findings of fact of the trial court will be accepted if they are supported by substantial, competent evidence, though that evidence may be controverted. Sun Valley Shamrock Res., Inc., v. Travelers Leasing Corp., 118 Idaho 116, 118, 794 P 2nd 1389, 1391 (1990); Rueth v. State,

103 Idaho 74, 77, 644 P 2nd 1333, 1336 (1982).

The task of weighing evidence is within the province of the trial court. The appellate court therefore accords great deference to the trial judge's opportunity to weigh conflicting testimony and to assess the credibility of witnesses. Rueth, 103 Idaho at 77, 644 P 2nd at 1336; PFC, Inc. V. Rockland Tel. Co., Inc., 121 Idaho 1036, 1038, 829 P 2nd 1385, 1387 (Ct. App 1992). It follows that the appellate court will view the evidence in the light most favorable to the prevailing party. PFC, Inc., 121 Idaho at 1038, 829 P 2nd at 1387; Martsch v. Nelson, 109 Idaho 95, 100, 705 P 2nd 1050, 1055 (Ct. App. 1985).

The findings of the trial court on the question of damages will not be set aside when based upon substantial and competent evidence. Trilogy Networks Sys., Inc. v. Johnson, 144 Idaho 844, 846, 172 P 3rd 1119, 1121 (2007).

II

THE ALLEGED OFFER, WHICH WAS NEITHER MADE NOR ACCEPTED, WAS NOT ADMISSIBLE ON THE UNJUST ENRICHMENT CLAIM UNDER RULE 408 OF THE IDAHO RULES OF EVIDENCE.

The Plaintiff sued the Defendant claiming Defendant was

unjustly enriched by the horse barn and corrals he built on her property. In his Complaint (R. P. 1-3) he claimed that she would be unjustly enriched by the sum of $50,000.00 if she were allowed to retain the improvements without compensating him.

In his opening statement Plaintiff's counsel reiterated that the case is a case seeking recovery for unjust enrichment. (Tr p. 7, L. 5-6). He stressed that the case should be restricted to issues of unjust enrichment (Tr p. 9, L. 22-25). Plaintiff's counsel then claimed that Defendant had agreed to reimburse Plaintiff $35,000.00 for his interest in the property (Tr 7 p. 24 and 25 and p. 8, L. 1). Defendant's counsel placed Plaintiff's counsel and the Court on notice that the Defendant denied that such an offer was made and that evidence of such an offer would be inadmissible under Rule 408 of the Idaho Rules of Evidence. (Tr p. 10, L. 2-15).

On direct examination Plaintiff's counsel inquired of the Plaintiff "...after you separated did there come a time when you and she talked about how she was going to settle with you on the improvements?" (Tr p. 118, L. 15-17).

Defendant objected on the ground the testimony was inadmissible under Rule 408 (Tr p. 119, L. 7-11).

Plaintiff's counsel then tried to recast the alleged offer as an agreement to settle (Tr p. 119, L. 12-15). The Court observed that an oral contract had not been plead (Tr p. 120, L. 3-6 and 10-16). Plaintiff's counsel then argued that there was a distinction between an offer to compromise and evidence of an agreement (Tr. p. 120, L. 17-25), and that an agreement should be treated as an admission, even though he was not suing for breach of an agreement.

In the proposed offer of proof, Plaintiff did not say the offer was accepted by the Plaintiff. If the Plaintiff had accepted the offer, his complaint would have sought enforcement of the agreement rather than a claim for unjust enrichment.

The Plaintiff well knew that testimony of the alleged settlement offer was not to be admitted, but he couldn't restrain himself from blurting it out (Tr p. 209, L. 9). The testimony was properly stricken (Tr p. 210, L. 1-2).

Rule 408 is clearly designed to give the parties freedom to discuss settlement without having their efforts

treated as admissions of liability or admissions as to the amount of damage for which they are responsible.

Plaintiff has cited Soria v. Sierra Pacific Airlines, 111 Idaho 594, 726 P2nd 706 (1986) for the proposition that an offer of settlement or settlement agreement may be offered in evidence to show bias of a witness. Soria was a case involving multiple defendants. The trial court excluded evidence of a settlement reached between plaintiffs and one of the defendants. The decision was upheld on appeal.

Soria is distinguishable from the case at bar. Here the Plaintiff was not trying to prove bias of a non-party witness. The bias of a party can be assumed in a one-on-one situation. There is no reason to prove bias. The Plaintiff was clearly trying to use the alleged offer as an admission of liability and an admission on the amount of unjust enrichment.

The Idaho Supreme Court in Quick v. Crane, 111 Idaho 759, 727 P2nd 1187 (1986) reviewed the strong policy favoring settlement and barring evidence relating to compromises or offers of compromise. That case involved

complex issues of multiple defendants not present before this Court. The trial court excluded the settlement evidence. The Idaho Supreme Court held that the trial judges have broad discretion in determining the admissibility of such evidence, and their decision will not be overturned absent a clear showing of abuse, citing Soria v. Sierra Pacific Airlines, supra.

The trial court properly refused to admit the alleged offer.

III

THE FINDING OF THE TRIAL COURT THAT DEFENDANT WAS NOT UNJUSTLY ENRICHED WAS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

In order for the Plaintiff to have prevailed in the District Court, the Plaintiff was required to prove (1) that the Defendant was unjustly enriched by the construction of the barn and corrals on the Defendant's property and (2) that it would be unconscionable for the Defendant to retain the benefits without compensating the Plaintiff. Hixon v. Allphin, 76 Idaho 327, 281 P 2nd 1042 (1955); Continental Forest Products, Inc., v. Chandler Supply Company, 95 Idaho 739, 518 P 2nd 1201 (1974); Gillette v. Storm Circle Ranch,

et. al., 101 Idaho 663, 619 P 2nd 1116 (1980).

The measure of damages is not necessarily the value of the money, labor and materials provided by the Plaintiff to the Defendant, but the benefit the Defendant received which would be unjust for the Defendant to retain. Unjust enrichment is an equitable doctrine and is inapplicable when the Plaintiff in an action fails to provide the proof necessary to establish the value of the benefit conferred upon the Defendant. Nielson v. Davis, 98 Idaho 314, 528 P 2nd 196 (1974).

The value of any benefit unjustly received by the Defendant in an action based upon unjust enrichment must be proven to a reasonable certainty. Olsen v. Quality Pak, Co., 93 Idaho 607, 469 P 2nd 45 (Cited with approval in Gillette v. Storm Circle Ranch, et. al supra).

The District Court found against the Plaintiff on both elements of Plaintiff's claim, i.e. the Court found the Defendant was not unjustly enriched, and the Court found that it would not be unconscionable for the Defendant to retain the benefit, if any, which was conferred.

Plaintiff's copious recital of evidence supporting the

Plaintiff's position is set forth in the Plaintiff's Statement of Facts. For the most part, the Plaintiff's evidence was evidence of time, labor and material expended in constructing the horse barn and corrals on Defendant's property. The Plaintiff failed to produce a single credible witness who could establish that the value of the Defendant's property at the time the property was sold was greater with the horse barn and corrals than it would have been had they not been constructed on the Defendant's property.

The Plaintiff produced a certified appraiser, J. Patrick Merrigan, who had not inspected the barn and was not asked whether th barn and corrals increased the value of Defendant's property.

Plaintiff provided witnesses who said the barn was well laid out to be a safe barn for horses, but they provided no evidence that the barn and corrals increased the value of Defendant's property.

Plaintiff offered testimony of the buyers, Tony Periria and Megan Sorenson Periria which showed they placed a high value on the barn when compared to the home, but cross

examination revealed that they had no expertise on the issue of whether the Defendant's property was worth more money with the horse barn and corrals than without them.

The Defendant called Lloyd Smith, a real estate agent and broker with 17 years of experience who had inspected the premise and had given the Defendant a broker's opinion of value prior to the time the property was listed for sale. His opinion of value was $130,940.00. (Ex. D).

He testified that real estate agents routinely describe rural homes with irrigated acreage as horse property, whether the properties have barns and corrals or not (Tr p. 298, L. 8-14). The most important part of Lloyd Smith's testimony was that Nancy Orthman's home and five acres would have sold for just as much money without the horse barn and corrals as it sold with them (Tr p. 296, L. 13 & 14; Tr p. 300, L. 13). He provided comparisons of homes with acreages without horse barns and corrals to support his opinion that the market for Nancy's property would have generated the sale price of $130,000.00 without the barn and corrals.

If Nancy could have received as much money for her property without the barn and corrals as she received for it

with the barn and corrals, she was not unjustly enriched. Although the property was sold to a couple who loved the horse barn, Plaintiff failed to show that the property sold more quickly because of the presence of the horse barn and corrals or that she received more money because of their presence.

Nancy Orthman considered the horse barn and corrals which were built with used material and poorly maintained by Chuck Kendall to be an eyesore (Tr p. 332, L. 3-7). To some people the barn and corals may have been treasure. To others they may have been trash. The bottom line is that Nancy was no better off with them than without, so she was not enriched.

Judge Brody's finding that Nancy Orthman was not enriched by the addition of the horse barn and corrals was supported by substantial, competent evidence. Findings of the trier of fact which are supported by substantial, competent evidence are not to be disturbed on appeal.

IV

ALTHOUGH NOT NECESSARY TO THE TRIAL COURT'S DECISION, THE CONCLUSION THAT IT WOULD NOT BE UNCONSCIONABLE FOR DEFENDANT

TO RETAIN THE ENRICHMENT, IF ANY, SHE RECEIVED WAS SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

Once the trial court determined that no benefit was conferred on Nancy Orthman by the construction of the horse barn and corrals, it was not necessary for the court to enter a conclusion that if the Defendant did receive a benefit, it would not be unjust for her to retain it without compensating the Plaintiff. Nevertheless, that conclusion by the Court was supported by substantial, competent evidence and was not an abuse of discretion.

The Defendant purchased the home and acreage for herself and her three children. She did not purchase it to provide a place for the Plaintiff to keep and train his race horses (Tr p. 330, L. 1-3). The Plaintiff pestered the Defendant about building a horse barn on the property, until she finally relented. She made it clear to him that he was not going to obtain an interest in her property by building a horse barn (Tr p. 330, L. 13-25; Tr p. 331, L. 1-16).

With the exception of occasional intervals in which the parties separated due to disagreements, the Plaintiff resided with the Defendant from the time the property was

purchased in 2001 until an argument in April of 2006 when the Plaintiff refused to help with the annual irrigation bill for the property. The Plaintiff threw his money clip at the Defendant, and the Defendant told him to leave the home (Tr p. 254, L. 1-9).

The Defendant still allowed the Plaintiff to keep and train his horses on the property for the balance of 2006, all of 2007 and until the middle of 2008 (Tr p. 255, L. 2-25; Tr p. 266, L. 1-25 and p. 267, L. 1-15). During that time, the Plaintiff paid no rent for use of the home and utilities nor for use of the pasture and land on which the barn and corrals were located. All of those expenses were paid by the Defendant (Tr p. 142, L. 13-17; Tr p. 255, L. 15-22).

The Plaintiff did little or nothing to maintain the barn and premises. After he was banned from Defendant's home he brought in a dumpy looking outhouse (Tr p. 268, L. 1-21)(Exhibit M).

The Plaintiff was given the opportunity to remove the barn and corrals from the premises before it was sold. The fence posts were not anchored in concrete. The housing from

the sugar factory labor camp were just resting on cinder blocks. The Plaintiff considered moving the barn and corrals to a property owned by Ken and JoAnna Erickson, but he did not pursue that opportunity (Tr p. 345, L. 5-21). When he left the property, it was strewn with boxes of old horseshoes and scrapped and broken building materials (Tr p. 258, L. 2-16). He took the gates (Tr p. 154, L. 20-23).

The Plaintiff testified that horse racing was not an activity pursued for business purposes. During the testimony, it was clear that he built the barn and corrals so he could pursue his passion for horse racing. He did not build the barn and corrals with an expectation for compensation or profit (Tr p. 124, L. 2-6). He had financial problems when the relationship began (Tr p. 152, L. 13-23). There was nothing to indicate that he tried to improve his financial circumstances during the time of the relationship.

The trial court observed in Finding No. 42 that the Defendant was a more credible witness than the Plaintiff. The weight given to the testimony of witnesses is to be determined by the trier of fact.

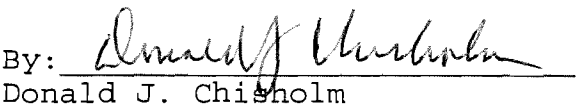
While it may not have been necessary for the Court to have gone so far as to characterize the Plaintiff as an "officious intermeddler", the Court's conclusion of law that Defendant did not receive a benefit which would be unconscionable for her to retain was well supported by the evidence and was not an abuse of the Court's discretion.

CONCLUSION

The judgment of the trial court should be affirmed. Nancy Orthman should be awarded her costs and attorney fees.

Respectfully Submitted.

Chisholm Law Office

By: 
Donald J. Chisholm

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of August, 2011, I served a true and correct copy of the foregoing Respondent's Brief upon:

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Attorney(s) of record in the above-entitled matter, by mailing a copy thereof in the United States mail, postage prepaid by first class mail, in an envelope addressed to said person(s) at the foregoing address(es).

Donald J. Chisholm